

# EXHIBIT 8

Niemann, Robert

September 14, 2007

Baltimore, MD

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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IN RE: PHARMACEUTICAL : MDL NO. 1456

INDUSTRY AVERAGE WHOLESALE : CIVIL ACTION

PRICE LITIGATION : 01-CV-12257-PBS

THIS DOCUMENT RELATES TO :

U.S. ex rel. Ven-a-Care of : Judge Patti B. Saris

the Florida Keys, Inc. :

v. :

Abbott Laboratories, Inc., : Chief Magistrate

No. 06-CV-11337-PBS : Judge Marianne B.

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Bowler

Baltimore, Maryland

Friday, September 14, 2007

Videotaped Telephone Deposition of ROBERT NIEMANN

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1 specific instance that you can recall in which  
2 average wholesale price was used to refer to  
3 something other than what was published in the  
4 compendia?

5 A. No. Other than to articulate that same  
6 idea, that same concept.

7 Q. Yes, sir. And in the various  
8 conversations that you had with either Congress,  
9 congressional representatives or congressional  
10 staffers, was the term AWP or average wholesale  
11 price, in your experience, used to refer to prices  
12 published in Red Book and other compendia?

13 A. Yes.

14 Q. And in those various phone conversations,  
15 there was never any confusion expressed about what  
16 AWP referred to, that it is a published price,  
17 correct?

18 A. The context would have been clear.

19 Q. And clear that it was the published price?

20 A. Clear -- it would have been clear either  
21 way. It would have been -- the context would have  
22 been clear that we were talking about the Red Book

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1 AWP or not.

2 Q. You mentioned the Office of Inspector  
3 General. Do you recall having communications with  
4 the Office of Inspector General relating to drug  
5 payment policy issues?

6 A. Yes. I'm -- yes, I know I did.

7 Q. Who at OIG did you communicate with?

8 A. Rob Vito.

9 Q. What do you recall about your  
10 conversations with Mr. Vito?

11 MS. OBEREMBT: I'm going to object to the  
12 extent that his conversations might contain  
13 deliberative process information.

14 THE WITNESS: His findings, more than  
15 anything.

16 BY MR. COOK:

17 Q. How often did you speak to Mr. Vito?

18 A. Occasionally.

19 Q. Do you recall anybody else being on these  
20 telephone calls?

21 A. There were some other IG personnel who  
22 were working on the same, I think -- I think Rob was

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1 a little higher up, certainly over time. So there  
2 were other individuals involved in it, IG personnel.

3 Q. What, if anything, do you recall about the  
4 content of the conversations that you had with  
5 Mr. Vito?

6 A. Well, as I say, his findings. In other  
7 words, he would be explaining the prices that he  
8 found in his research, which ultimately were reported  
9 in these various reports that he would issue.

10 Q. Did you ever have any email communications  
11 with Mr. Vito?

12 A. I actually don't remember if we -- it  
13 seems to me, we talked over the phone.

14 Q. Anybody else at OIG that you can think of  
15 that you communicated with?

16 A. I know I did, like I would have spoken  
17 with the data person who was running the data on the  
18 report. That type of thing.

19 Q. How about the GAO, the General Accounting  
20 Office, did you ever have any communications with  
21 anyone at GAO?

22 A. Yes. That's fuzzier, but --

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1 Q. Do you recall who at GAO you --

2 A. I don't. And it seems to me, the two that  
3 I remember in particular are both, they both retired  
4 before I did.

5 Q. What was the subject matter of your  
6 communications with GAO?

7 A. I honestly don't remember.

8 Q. Do you recall communicating with anybody  
9 on the White House staff relating to drug payment  
10 issues?

11 A. No, I don't.

12 Q. How about at the various states. Any  
13 state Medicaid programs? Do you recall communicating  
14 with anyone?

15 A. That would have been very occasional,  
16 because in general, I didn't -- I didn't work on  
17 policies that affected states.

18 Q. Who at CMS was responsible for drug  
19 payment issues on the Medicaid side?

20 A. Well, the -- Larry Reed.

21 Q. Would you communicate often with Mr. Reed  
22 about drug payment policy issues?

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<p style="text-align: right;">Page 190</p> <p>1 A. It's how I remember it.</p> <p>2 Q. Right. That HCFA had one alternative of</p> <p>3 estimated acquisition costs that would have allowed</p> <p>4 it, if implementable, to gauge the Medicare allowable</p> <p>5 amount to something closer than to actual acquisition</p> <p>6 cost, correct?</p> <p>7 A. Yes.</p> <p>8 Q. Was it your sense that HCFA as an</p> <p>9 organization wanted to move towards EAC?</p> <p>10 MS. OBEREMBT: Objection.</p> <p>11 THE WITNESS: I don't know how to answer</p> <p>12 that. I mean, you know, how many people would have</p> <p>13 been involved in this and what their opinions would</p> <p>14 have been, I never polled anybody.</p> <p>15 BY MR. COOK:</p> <p>16 Q. Okay. Was there anybody within the agency</p> <p>17 who preferred to stay with AWP rather than go to EAC</p> <p>18 in your memory?</p> <p>19 MS. OBEREMBT: Objection to the extent</p> <p>20 you're asking him about deliberative process</p> <p>21 conversations.</p> <p>22 THE WITNESS: So what do I do?</p>	<p style="text-align: right;">Page 192</p> <p>1 preferred to go with -- stay with AWP knowing that</p> <p>2 AWP exceeded acquisition costs, rather than going to</p> <p>3 EAC which would approximate acquisition costs, you're</p> <p>4 going to instruct him not to answer those questions?</p> <p>5 MS. OBEREMBT: I'm going to instruct him</p> <p>6 not to disclose discussions he had about what a</p> <p>7 policy should be, because that goes to the heart of</p> <p>8 the deliberative process privilege.</p> <p>9 MR. COOK: Well, I'll ask him a question</p> <p>10 and you can instruct him not to answer, because I</p> <p>11 just want this one to be -- I want to know what I can</p> <p>12 ask and what I can't. And I'll just go through the</p> <p>13 questions and you can instruct him not to answer</p> <p>14 them, if you think that they are not, you know,</p> <p>15 permissible.</p> <p>16 BY MR. COOK:</p> <p>17 Q. Mr. Niemann, you understood that there</p> <p>18 were essentially two options available to the</p> <p>19 Medicare program between 1991 and 1997 for</p> <p>20 establishing what the Medicare allowable should be or</p> <p>21 would be for physician administered drugs, correct?</p> <p>22 It's restating an earlier question. I know.</p>
<p style="text-align: right;">Page 191</p> <p>1 MS. OBEREMBT: Why don't we take a break</p> <p>2 and let me find out what he was going to say.</p> <p>3 MR. COOK: Okay.</p> <p>4 THE VIDEOGRAPHER: This marks the end of</p> <p>5 tape three in the deposition of Robert Niemann.</p> <p>6 Going off the record. The time is 13:54:38.</p> <p>7 (Recess.)</p> <p>8 THE VIDEOGRAPHER: This marks the</p> <p>9 beginning of tape four in the deposition of Robert</p> <p>10 Niemann. Going back on the record. The time is</p> <p>11 14:02:57.</p> <p>12 MS. OBEREMBT: Chris, I understand your</p> <p>13 question to be asking him about discussions he had</p> <p>14 with others at CMS about what the drug policy should</p> <p>15 be.</p> <p>16 MR. COOK: Yes.</p> <p>17 MS. OBEREMBT: So on that basis, I'm going</p> <p>18 to instruct him not to answer because it does go to</p> <p>19 deliberative process.</p> <p>20 MR. COOK: And just so I know the</p> <p>21 parameters of the instruction not to answer, to the</p> <p>22 extent that there was anybody within CMS who actually</p>	<p style="text-align: right;">Page 193</p> <p>1 A. On the allowable, it's really technically,</p> <p>2 I guess, three.</p> <p>3 Q. Okay.</p> <p>4 A. Because we pay the lower of the actual</p> <p>5 charge on the --</p> <p>6 Q. All right. But there will always be a</p> <p>7 charge in connection with the claims for physician</p> <p>8 administered drug, correct?</p> <p>9 A. Right.</p> <p>10 Q. And the question is going to be, if that</p> <p>11 charge exceeds a certain amount, will you pay the</p> <p>12 charge or that certain amount, correct?</p> <p>13 A. Right.</p> <p>14 Q. So if, for example, the charge is -- well,</p> <p>15 I guess the last data point in any claim would be the</p> <p>16 actual cost to the physician, correct, although</p> <p>17 that's not one that you have.</p> <p>18 A. Well, all I was saying is that there are</p> <p>19 three.</p> <p>20 Q. Right.</p> <p>21 A. Components to the decision.</p> <p>22 Q. Correct. And if we were to look at an</p>

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<p>1 individual claim, there would be four, there would be  2 three data points, one would be the physician has an  3 actual cost, correct?  4 A. Right.  5 Q. You don't know what that is?  6 A. Right.  7 Q. The physician states a charge to the  8 program, correct?  9 A. Right.  10 Q. You do know what that number is?  11 A. Yes.  12 Q. And the program, through its carriers, has  13 an allowable amount which the charge may not exceed  14 or will be disallowed to the extent that it exceeds  15 the allowable, correct?  16 A. They wouldn't pay any more than that.  17 Q. Right. There were two options for the  18 program to set what the allowable amount would be  19 under the Medicare regulations as they existed  20 between 1991 and 1997, correct?  21 A. Yes. I would just say, I would recognize  22 your struggle. The maximum allowable.</p>	<p>1 A. Yes. I think the carriers.  2 Q. By either HCFA for its agent?  3 A. Right.  4 Q. Would calculate that number, correct?  5 A. Yes.  6 Q. And do you have an understanding of how  7 HCFA or its agents would calculate that number?  8 A. No.  9 Q. Do you have an understanding of what that  10 number would represent?  11 A. Oh, as I said before, I think it would be  12 the best estimate of what the physician's acquisition  13 cost was. But I don't necessarily mean that  14 individual physician.  15 Q. And in choosing between the published  16 average wholesale price and the best estimate of what  17 the physician's acquisition cost was, that is  18 estimated acquisition cost, did you have any  19 discussions within the agency about which option to  20 use?  21 MS. OBEREMBT: You can answer that. You  22 can tell him whether or not you had discussions about</p>
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<p>1 Q. Precisely.  2 A. Because it would never exceed the actual  3 charge.  4 Q. Precisely.  5 A. I get the drift of what you're saying.  6 Q. And the two options for setting the  7 maximum allowable would be 100 percent of the average  8 wholesale price as published in Red Book or other  9 compendia, right?  10 A. Or other compendia.  11 Q. That's correct?  12 A. Yes, I think that's what it said.  13 Q. The other option available to the Medicare  14 program under the regulations was to establish an  15 estimated acquisition cost, correct?  16 A. Yes.  17 Q. Unlike the average wholesale price, that  18 would be a calculated number, correct?  19 A. Yes.  20 Q. It would be calculated by HCFA?  21 A. I --  22 Q. Or the carriers?</p>	<p>1 options.  2 THE WITNESS: Yes.  3 BY MR. COOK:  4 Q. And were there individuals who advocated  5 for staying with the average wholesale price?  6 MS. OBEREMBT: I'll direct you not to  7 answer that on the grounds of deliberative process.  8 MR. COOK: So I can't get the foundation  9 of whether there were individuals who took that  10 position?  11 MS. OBEREMBT: That's right. Because that  12 goes to the substance of the discussions. Your  13 previous went to whether or not there were  14 discussions. Now you're getting into the substance,  15 so I have to object.  16 BY MR. COOK:  17 Q. Were there individuals who advocated using  18 the estimated acquisition cost?  19 MS. OBEREMBT: Objection. Grounds of  20 deliberative process. I'll instruct you not to  21 answer.  22 BY MR. COOK:</p>

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<p>1 Q. Who participated in these discussions?</p> <p>2 A. It would have been my division director,</p> <p>3 me, and the deputy group director. Legislative</p> <p>4 personnel on our legislation staff. I don't mean --</p> <p>5 I don't mean staffers on the Hill. I mean our</p> <p>6 people. People like that.</p> <p>7 Q. When did these conversations take place?</p> <p>8 A. I guess off and on for the whole time that</p> <p>9 I was involved in it. Maybe not -- not too early. I</p> <p>10 don't have that clear recollection of --</p> <p>11 Q. As a matter of fact, for the entire time</p> <p>12 period where estimated acquisition cost was an option</p> <p>13 available to HCFA, HCFA in fact established its</p> <p>14 maximum allowable cost based upon average wholesale</p> <p>15 price, correct?</p> <p>16 A. Yes. Except where a carrier may have done</p> <p>17 it sooner than when this all came about with OMB and</p> <p>18 the information collection.</p> <p>19 Q. In any of these discussions, do you recall</p> <p>20 any participant ever expressing to you the belief</p> <p>21 that by paying average wholesale price, the Medicare</p> <p>22 program was reimbursing physicians at their actual</p>	<p>1 the deliberative process privilege. I'll instruct</p> <p>2 you not to answer.</p> <p>3 BY MR. COOK:</p> <p>4 Q. What position did you take about using</p> <p>5 average wholesale price or the estimated acquisition</p> <p>6 cost?</p> <p>7 MS. OBEREMBT: Objection on the grounds of</p> <p>8 deliberative process. I'll instruct you not to</p> <p>9 answer.</p> <p>10 BY MR. COOK:</p> <p>11 Q. Did politics ever play a role in the</p> <p>12 Medicare program's decision to continue to use</p> <p>13 average wholesale price rather than use estimated</p> <p>14 acquisition costs to establish its maximum allowable</p> <p>15 payment amount for drugs?</p> <p>16 MS. OBEREMBT: Objection to the extent</p> <p>17 you're asking him about discussions with agency</p> <p>18 personnel, where a policy decision was made. I have</p> <p>19 to instruct you not to answer that, too, I think.</p> <p>20 BY MR. COOK:</p> <p>21 Q. At various points in time between 1991 and</p> <p>22 1997, without telling me about what discussions were</p>
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<p>1 acquisition cost?</p> <p>2 MS. OBEREMBT: Objection on the grounds of</p> <p>3 deliberative process. I'll instruct you not to</p> <p>4 answer.</p> <p>5 BY MR. COOK:</p> <p>6 Q. Has anybody ever in your time at HCFA</p> <p>7 expressed to you the belief that average wholesale</p> <p>8 price is a reliable indicator of the acquisition cost</p> <p>9 to physicians for drugs?</p> <p>10 MS. OBEREMBT: I'm going to object to the</p> <p>11 extent you're asking him about conversations he had</p> <p>12 that involve deliberative processes of the agency.</p> <p>13 I'm going to instruct you not to answer that, too.</p> <p>14 BY MR. COOK:</p> <p>15 Q. In any of these conversations relating to</p> <p>16 the possibility of abandoning AWP and going to</p> <p>17 estimated acquisition cost, did any of the</p> <p>18 individuals that you've described ever raise concerns</p> <p>19 about what the consequences would be to</p> <p>20 beneficiaries' access to care or other program goals</p> <p>21 of going to EAC?</p> <p>22 MS. OBEREMBT: Objection on the grounds of</p>	<p>1 made, is it fair to say the decision was made to stay</p> <p>2 with AWP and not go to estimated acquisition cost?</p> <p>3 A. Well, that was the stated, that was the</p> <p>4 regulation.</p> <p>5 Q. Well, the regulation allowed both.</p> <p>6 A. Oh, allowed both.</p> <p>7 Q. Yes.</p> <p>8 A. I'm sorry, would you repeat.</p> <p>9 Q. At various points in time, when the</p> <p>10 possibility of going from AWP to EAC was considered?</p> <p>11 A. Right.</p> <p>12 Q. In fact, HCFA continued to use AWP,</p> <p>13 correct?</p> <p>14 A. It did.</p> <p>15 Q. All right. After discussions relating to</p> <p>16 a possible change, and after it was decided to remain</p> <p>17 with AWP, did you ever have any discussions with any</p> <p>18 other personnel at HCFA about the decision that had</p> <p>19 already been made to stay with AWP, and whether that</p> <p>20 was a good idea?</p> <p>21 MS. OBEREMBT: Objection, because again I</p> <p>22 think you don't have a specific point demarcated.</p>

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<p>1 And his post policy discussions may be predecisional</p> <p>2 to subsequent policies. So I can't -- I'm going to</p> <p>3 object again on deliberative process, and instruct</p> <p>4 you not to answer.</p> <p>5 BY MR. COOK:</p> <p>6 Q. Did you ever have any discussions with</p> <p>7 anyone outside of HCFA about whether Medicare</p> <p>8 could -- should continue to pay based upon AWP or</p> <p>9 should use some other methodology for establishing</p> <p>10 the maximum allowable amount?</p> <p>11 A. That I don't remember. Outside of HCFA?</p> <p>12 Q. Yes.</p> <p>13 A. I don't remember.</p> <p>14 Q. Say someone with Congress?</p> <p>15 A. That would have occurred. I can't</p> <p>16 remember specifically, but that would have occurred.</p> <p>17 Q. Without the specifics --</p> <p>18 A. Not a member of Congress, but the staffer.</p> <p>19 Q. The staffer. Do you remember generally</p> <p>20 what the subject matters were relating to the</p> <p>21 possible departure from AWP as a methodology in your</p> <p>22 conversations with congressional staffers?</p>	<p>1 MS. OBEREMBT: Are you asking him in his</p> <p>2 conversations with people on the Hill?</p> <p>3 MR. COOK: Yes.</p> <p>4 MS. OBEREMBT: Okay. So focus your answer</p> <p>5 on just conversations you had with people on the</p> <p>6 Hill, what was said --</p> <p>7 THE WITNESS: Not HCFA people, but</p> <p>8 staffers.</p> <p>9 MS. OBEREMBT: Right.</p> <p>10 BY MR. COOK:</p> <p>11 Q. Right. Did you or anybody else from HCFA</p> <p>12 in these conversations with staffers on the Hill ever</p> <p>13 advocate a change in the methodology away from AWP?</p> <p>14 A. Yes. Yes.</p> <p>15 Q. Why?</p> <p>16 MS. OBEREMBT: Objection. That goes to a</p> <p>17 deliberative process issue, since you're asking him</p> <p>18 why they would have expressed that opinion to the</p> <p>19 staffers.</p> <p>20 MR. COOK: So the decision was whether to</p> <p>21 talk to Congress?</p> <p>22 MS. OBEREMBT: You can ask him what was</p>
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<p>1 A. I'm sorry. What was the -- what's the</p> <p>2 crux of that? Do I remember what?</p> <p>3 Q. Do you remember generally what the subject</p> <p>4 matters of those conversations were?</p> <p>5 A. Subject matters?</p> <p>6 Q. Let me ask it a little bit easier. Do you</p> <p>7 remember anything at all about your conversations</p> <p>8 with congressional staffers?</p> <p>9 A. That is easier. Not much, but it would --</p> <p>10 it would have been the IG information, and some kind</p> <p>11 of methodology to pay a fair price.</p> <p>12 Q. Do you recall whether you or anybody else</p> <p>13 from HCFA was advocating a change in the methodology</p> <p>14 to these congressional staffers?</p> <p>15 MS. OBEREMBT: You can answer that.</p> <p>16 THE WITNESS: Was anybody advocating a</p> <p>17 change to what the staffers were recommending? I'm</p> <p>18 sorry.</p> <p>19 BY MR. COOK:</p> <p>20 Q. The status quo was that --</p> <p>21 A. AWP and we never implemented EAC. That</p> <p>22 was the status quo.</p>	<p>1 said to the staffers, but you can't ask him why that</p> <p>2 was said, because that does go to deliberative</p> <p>3 process information, okay?</p> <p>4 MR. COOK: Just so I understand and I've</p> <p>5 got the record straight, exactly which decision is</p> <p>6 that deliberation predecisional to?</p> <p>7 MS. OBEREMBT: To decisions made within</p> <p>8 the agency to either continue with the existing</p> <p>9 policy or to proceed with change in policy. So why</p> <p>10 don't you ask him what he said to the staffer -- or</p> <p>11 was he present in any other HCFA meeting with a</p> <p>12 congressional staffer.</p> <p>13 BY MR. COOK:</p> <p>14 Q. Did you express to the congressional</p> <p>15 staffers why it was that HCFA was advocating a change</p> <p>16 in the methodology by which Medicare paid for</p> <p>17 physician administered drugs?</p> <p>18 A. Yes. I'm sure I would have expressed the</p> <p>19 reason.</p> <p>20 Q. And what was that reason?</p> <p>21 A. It would have been the IG reports, the</p> <p>22 fact that -- that at least some of the drugs under</p>

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<p style="text-align: right;">Page 206</p> <p>1 the AWP policy were -- we were paying too much.</p> <p>2 Q. When you say too much, can you quantify</p> <p>3 that for me?</p> <p>4 A. No, I can't quantify it, because of the</p> <p>5 reason you have cited, that it wasn't a single amount</p> <p>6 with every drug. It varied.</p> <p>7 Q. When you say too much, is that a dollar</p> <p>8 amount, a percentage?</p> <p>9 A. I remember that being some concern. And</p> <p>10 remember being relieved that I wasn't the one who had</p> <p>11 to pick the number. I mean, it's a judgment call</p> <p>12 what -- like whether to knock off 5 percent or 15</p> <p>13 percent, that's a judgment call.</p> <p>14 Q. And 10 percent of a \$400 drug is a lot</p> <p>15 more than a thousand percent of a \$2 drug, correct?</p> <p>16 A. Indeed it is.</p> <p>17 Q. Did you express to Congress any position</p> <p>18 about what should be the appropriate reimbursement</p> <p>19 amount for physician administered drugs?</p> <p>20 A. I actually don't remember doing that.</p> <p>21 Q. Did anybody, to your knowledge, express to</p> <p>22 Congress what the appropriate reimbursement amount</p>	<p style="text-align: right;">Page 208</p> <p>1 average or a nondiscounted list price?</p> <p>2 A. Not that I remember.</p> <p>3 Q. And so when Congress in 1997 promulgated a</p> <p>4 law requiring payment based at 95 percent of average</p> <p>5 wholesale price, based upon your experience, would</p> <p>6 you believe that Congress understood what average</p> <p>7 wholesale price represented in Red Book?</p> <p>8 MS. OBEREMBT: Objection.</p> <p>9 MR. BATES: Object to form.</p> <p>10 THE WITNESS: I don't know what you mean</p> <p>11 when you say specifically understood what it</p> <p>12 specifically represented. In other words, I think</p> <p>13 they obviously felt that it was at least 5 percent</p> <p>14 above what it should be.</p> <p>15 BY MR. COOK:</p> <p>16 Q. But did you ever in your conversations</p> <p>17 with anybody within Congress have a congressional</p> <p>18 staffer or congressional member express to you the</p> <p>19 belief that average wholesale price was an actual</p> <p>20 average of -- a calculated average of wholesale</p> <p>21 prices?</p> <p>22 A. I do not remember that.</p>
<p style="text-align: right;">Page 207</p> <p>1 should be for physician administered drugs?</p> <p>2 A. I wouldn't know if somebody else did.</p> <p>3 Q. But in the conversations that you</p> <p>4 participated in, did anyone express an idea of what</p> <p>5 should be the appropriate reimbursement amount?</p> <p>6 A. I don't remember.</p> <p>7 Q. Did you have discussions with -- do you</p> <p>8 remember anything else at all about your</p> <p>9 conversations with the congressional staffers?</p> <p>10 A. Yes.</p> <p>11 Q. What do you remember?</p> <p>12 A. An interest in average sales price.</p> <p>13 Q. Do you remember when this was?</p> <p>14 A. No. I don't.</p> <p>15 Q. Was it Congress that was expressing an</p> <p>16 interest in average sales price or HCFA personnel?</p> <p>17 A. I'm not sure where -- where it was</p> <p>18 initiated, because some staffers were pretty well</p> <p>19 informed, so it could have been either one.</p> <p>20 Q. And in these conversations with</p> <p>21 congressional staffers, was there any confusion about</p> <p>22 whether published AWP's represented a calculated</p>	<p style="text-align: right;">Page 209</p> <p>1 Q. Other than -- well, can you remember</p> <p>2 anything else about your conversations with</p> <p>3 congressional staffers?</p> <p>4 A. No.</p> <p>5 Q. Do you remember what position the</p> <p>6 congressional staffers took about what the</p> <p>7 appropriate amount of reimbursement should be?</p> <p>8 A. I don't think -- I don't. I mean, this</p> <p>9 was a deliberation. I don't remember if they -- at</p> <p>10 what point they arrived at a position.</p> <p>11 Q. Were there any written documents used in</p> <p>12 any of these meetings or conversations?</p> <p>13 A. I only remember talking. I don't -- I</p> <p>14 just don't remember. There could have been. I don't</p> <p>15 remember.</p> <p>16 Q. Other than Congress, were there any other</p> <p>17 individuals outside of HCFA with whom you discussed</p> <p>18 the issue of whether the Medicare program should use</p> <p>19 some methodology other than AWP to establish</p> <p>20 allowable amounts for prescription drugs?</p> <p>21 A. If you consider Rob Vito of the IG -- is</p> <p>22 that HCFA? I mean, I don't know. I might have</p>

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<p>1 talked about it with him.</p> <p>2 Q. What did you discuss with Mr. Vito?</p> <p>3 MS. OBEREMBT: I'm going to object on the</p> <p>4 grounds of deliberative process. I'm going to</p> <p>5 instruct you not to answer about your conversations</p> <p>6 with Mr. Vito about whether HCFA should pursue a</p> <p>7 different policy.</p> <p>8 BY MR. COOK:</p> <p>9 Q. Any other individuals outside of HCFA with</p> <p>10 whom you discussed the possibility of using a</p> <p>11 methodology other than AWP?</p> <p>12 A. No. I don't remember.</p> <p>13 Q. During your discussions within HCFA and</p> <p>14 with Congress, both on whether or not the Medicare</p> <p>15 program should use a methodology other than AWP to</p> <p>16 establish allowable amounts, what information was</p> <p>17 available to you and to the other participants in</p> <p>18 those conversations?</p> <p>19 A. Well, I remember the IG reports. That</p> <p>20 was, that was the big thing. And other data that the</p> <p>21 IG -- and don't ask me, I'm amazed I remember the</p> <p>22 acronym. The acronym was NAMFUCO and one of the</p>	<p>1 Q. Do you recall this particular OIG report</p> <p>2 relating to the cost of dialysis related drugs?</p> <p>3 A. No.</p> <p>4 Q. You'll see that this one is addressed to</p> <p>5 the acting administrator. In your experience, did</p> <p>6 these reports, are these reports provided directly to</p> <p>7 the administrator of HCFA?</p> <p>8 A. I'm not sure I know what you mean.</p> <p>9 Q. Or were they addressed to the</p> <p>10 administrator of HCFA?</p> <p>11 A. Yes. I think that was the protocol.</p> <p>12 Q. And you'll see at the first paragraph of</p> <p>13 the cover memo to Exhibit Abbott 82 that the report</p> <p>14 was initiated at the request of HCFA following the</p> <p>15 promulgation of the proposed rule that would have</p> <p>16 paid for ESRD drugs at 85 percent of average</p> <p>17 wholesale price. Do you see that?</p> <p>18 A. I do.</p> <p>19 Q. Is it your memory that in fact HCFA</p> <p>20 requested the OIG to conduct reports following</p> <p>21 promulgation of that rule?</p> <p>22 A. No. I didn't remember that.</p>
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<p>1 Medicaid people would probably know what that stands</p> <p>2 for. I think the F was for fraud. Anyway, I</p> <p>3 remember them generating some data. That's what I</p> <p>4 remember.</p> <p>5 Q. Any other data that you recall being part</p> <p>6 of the consideration in these conversations?</p> <p>7 A. That's all I remember.</p> <p>8 Q. If I could get you to turn to Abbott</p> <p>9 Exhibit 82. This is an October 20, 1992 OIG report</p> <p>10 on the cost of dialysis related drugs. This is</p> <p>11 addressed to William Toby, Jr., the acting</p> <p>12 administrator of Health Care Financing</p> <p>13 Administration. In 1992, your responsibilities</p> <p>14 related to end stage renal disease, correct?</p> <p>15 A. Yes.</p> <p>16 Q. And it was approximately sometime in 1993,</p> <p>17 was it early or late 1993?</p> <p>18 A. Late.</p> <p>19 Q. So approximately a year later, you took</p> <p>20 over responsibility specifically for physician</p> <p>21 administered drug reimbursement, right?</p> <p>22 A. Yes.</p>	<p>1 Q. Do you have any reason to doubt that, in</p> <p>2 fact, that occurred?</p> <p>3 A. No. I have no reason to doubt that.</p> <p>4 Q. Who at HCFA likely would have requested</p> <p>5 the conduct of a report such as this by OIG?</p> <p>6 A. That's a good question. It would have</p> <p>7 been -- I'm not sure who it would have been.</p> <p>8 Q. If I can get you to turn to page 6 of this</p> <p>9 report. At the top, the OIG states that "under the</p> <p>10 new drug regulation separately billable drugs would</p> <p>11 be reimbursed based upon the lower of EAC or AWP." I</p> <p>12 assume that's the regulation that you and I have been</p> <p>13 talking about for a couple hours now, right?</p> <p>14 A. Right.</p> <p>15 Q. You'll see in the next two sentences that</p> <p>16 the OIG indicates that it was determining an EAC</p> <p>17 based upon surveys of actual invoice prices, and was</p> <p>18 itself developing an EAC for the more frequently</p> <p>19 administered separately billable drugs using median</p> <p>20 invoice price obtained from 30 dialysis facilities,</p> <p>21 so the second and third sentence of the first</p> <p>22 paragraph?</p>

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<p>1 A. Right.</p> <p>2 Q. Is that correct?</p> <p>3 A. Yes.</p> <p>4 Q. And the chart below provides data relating</p> <p>5 to Calcijex, Inferon and Vancomycin. What is</p> <p>6 Calcijex, do you know?</p> <p>7 A. I forget. It's very familiar, but I</p> <p>8 forget what the use was. It was a common drug for</p> <p>9 dialysis patients.</p> <p>10 Q. And the same for Inferon?</p> <p>11 A. There again, I remember -- I remember the</p> <p>12 name, but I don't remember what it was used for.</p> <p>13 Q. And then Vancomycin, do you recognize that</p> <p>14 as infusion antibiotic?</p> <p>15 A. Yes.</p> <p>16 Q. You'll notice that note two indicates that</p> <p>17 "Calcijex and Inferon are single source drugs and</p> <p>18 that Vancomycin is a multiple source drug," is that</p> <p>19 consistent with your memory of these drugs?</p> <p>20 A. I really don't have a memory on that</p> <p>21 point.</p> <p>22 Q. The chart prepared by the Office of</p>	<p>1 hard data on which you based policy decisions at</p> <p>2 HCFA?</p> <p>3 A. It would have counted. It was only 30</p> <p>4 facilities, but it -- it's data. But I think people</p> <p>5 would have been sensitive to the fact that it was 30</p> <p>6 facilities. I guess we would leave it up to the</p> <p>7 statisticians to tell us how significant that is.</p> <p>8 Q. But you would agree with me that HCFA was</p> <p>9 advised in 1992 that for at least these 30</p> <p>10 facilities, Vancomycin was available at a median</p> <p>11 acquisition cost of \$5 when its AWP was \$19.17,</p> <p>12 correct?</p> <p>13 A. Yes.</p> <p>14 Q. Is this information that you would have</p> <p>15 expected to come to you had you been the program</p> <p>16 analyst in 1992 for physician administered drugs?</p> <p>17 A. Well, I think what you meant to ask is for</p> <p>18 ESRD related drugs, not physician administered drugs.</p> <p>19 Q. Well, first, I was saying if you had been</p> <p>20 the analyst --</p> <p>21 MS. OBEREMBT: Let him finish.</p> <p>22 BY MR. COOK:</p>
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<p>1 Inspector General goes on to describe the EAC and the</p> <p>2 AWP as they have determined it for each of these</p> <p>3 products. I'd like to focus on Vancomycin, which is</p> <p>4 one of the drugs at issue in this case, Mr. Niemann.</p> <p>5 A. Okay.</p> <p>6 Q. What is it that OIG determined is the EAC</p> <p>7 for Vancomycin?</p> <p>8 A. According to the chart, \$5.</p> <p>9 Q. And AWP, according to the OIG, was what?</p> <p>10 A. \$19.17.</p> <p>11 Q. Approximately four times the EAC, correct?</p> <p>12 A. Yes.</p> <p>13 Q. And if you'll look over a little bit, the</p> <p>14 OIG indicates that 12 facilities were able to</p> <p>15 purchase at or below \$5, correct?</p> <p>16 A. Yes.</p> <p>17 Q. And nine facilities were purchasing at or</p> <p>18 above the EAC, correct?</p> <p>19 A. Well, actually, that says above.</p> <p>20 Q. Correct.</p> <p>21 A. The at would be -- 9 would be above.</p> <p>22 Q. Nine would be above. Is this the sort of</p>	<p>1 Q. I'm sorry.</p> <p>2 A. This would have been more likely to come</p> <p>3 to me as the ESRD reimbursement person. But</p> <p>4 actually, either way, it probably would have come to</p> <p>5 both of us. It would have come to people who</p> <p>6 promulgated the proposed rule and it might have come</p> <p>7 to me as well.</p> <p>8 Q. And although you have no specific memory</p> <p>9 of it, is this something that you would have expected</p> <p>10 that you would have reviewed carefully when it came</p> <p>11 to you?</p> <p>12 A. Yes.</p> <p>13 Q. Did you take any action with respect to</p> <p>14 reimbursement for Calcijex, Inferon or Vancomycin as</p> <p>15 a result of receiving this report, to your memory?</p> <p>16 A. I don't remember that we did.</p> <p>17 Q. Do you know whether anybody within HCFA</p> <p>18 considered taking any action with respect to</p> <p>19 reimbursement for any of these drugs as a result of</p> <p>20 receiving this report?</p> <p>21 MS. OBEREMBT: Could you repeat the</p> <p>22 question, please?</p>

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<p style="text-align: right;">Page 218</p> <p>1 THE REPORTER: "Question: Do you know 2 whether anybody within HCFA considered taking any 3 action with respect to reimbursement for any of these 4 drugs as a result of receiving this report? 5 MS. OBEREMBT: Chris, do you think you 6 could rephrase the question to ask whether he knows 7 if anybody took any action? 8 MR. COOK: Well, I know nobody took any 9 action. I actually want to know whether they 10 discussed taking any action and decided not to. 11 MS. OBEREMBT: Then I have to object based 12 on deliberative process, and I'll instruct you not to 13 answer. 14 BY MR. COOK: 15 Q. If I can get you to turn to appendix 2 of 16 the report, please. You see this is an array showing 17 the actual invoice price for the drugs studied by the 18 Office of Inspector General in this report, correct? 19 A. Yes. 20 Q. And again, I'd like to focus your 21 attention on Vancomycin because it's one of the drugs 22 at issue in this case. Correct me if I'm wrong, but</p>	<p style="text-align: right;">Page 220</p> <p>1 same product? No. I would not assume that. 2 Q. Would you take from this data comfort that 3 reimbursing at AWP was a reliable proxy for provider 4 costs? 5 A. No. 6 Q. Vancomycin, as I indicated -- or as the 7 report indicates, is a multiple source drug as 8 indicated in this chart, as well as in the footnotes. 9 But do you have any reason to believe that other 10 injectable multiple source drugs had ranges or prices 11 that were any different than Vancomycin? 12 MS. OBEREMBT: Objection. 13 BY MR. COOK: 14 Q. Do you have any reason to believe? 15 A. Oh, I'm sorry. I shook my head. I have 16 no idea. 17 Q. When you were the policy analyst, I keep 18 calling you program analyst, and I apologize. 19 A. I think that might be more right. That 20 might be what it was. 21 Q. When you were an analyst with a 22 responsibility for physician administered drugs, did</p>
<p style="text-align: right;">Page 219</p> <p>1 I believe the lowest price, invoiced price that the 2 OIG found for Vancomycin was \$3.45. 3 A. That's the lowest number I see. 4 Q. Yes. And that was, in fact, for a small 5 provider, correct? 6 A. Yes. 7 Q. And the highest price that anybody -- any 8 invoice reported to be paid for Vancomycin was 9 \$26.61, correct? 10 A. Yes. 11 Q. Would this indicate to you that Vancomycin 12 would be an example of a drug for which there was a 13 range of prices that providers were able to purchase 14 the drug at? 15 A. To tell you the truth, if I saw this, I 16 would talk to the analyst who prepared the report. 17 Q. Why is that? 18 A. Because -- because that discrepancy is so 19 wide. I'm answering your question. 20 Q. No. Please. Please. 21 A. Would I assume from this report that this 22 was an accurate reflection of the variation in the</p>	<p style="text-align: right;">Page 221</p> <p>1 you ever ask the Office of Inspector General to 2 conduct further such reports gathering data upon 3 which estimated acquisition costs could be 4 determined? 5 A. No. I don't ever remember doing that. 6 Q. Do you know if anyone within HCFA asked 7 the Office of Inspector General to gather such data? 8 A. I guess no, I don't know. 9 Q. And you would agree with me from this 10 report that such an undertaking would at least have 11 been possible? 12 MS. OBEREMBT: Objection. 13 THE WITNESS: Such an undertaking? You 14 mean that the IG could have -- 15 BY MR. COOK: 16 Q. Yes. 17 A. What do you mean, was it possible that the 18 IG could have gotten more data? 19 Q. Yes. 20 A. I guess it was. 21 Q. I mean, it certainly wasn't impossible for 22 HCFA to determine what the invoice prices were to</p>

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<p style="text-align: right;">Page 270</p> <p>1 re-examine its Medicare drug reimbursement 2 methodologies with the goal of reducing payments as 3 appropriate. Do you see that? 4 A. Yes, I do. 5 Q. What was HCFA's response to that? 6 A. Well, I'm reading it here. I wouldn't 7 have remembered but this does sort of jar my memory. 8 It says, we agree with the OIG's findings and 9 recommendations. We included a provision in the 10 president's 1998 budget bill. That would have been 11 President Clinton -- I kind of remember that -- that 12 would have eliminated the markup for drugs billed to 13 Medicare by requiring physicians to build a program 14 for the actual acquisition costs for drugs. 15 Q. And that -- that provision was not 16 enacted, was it? 17 A. Right. That's the last sentence. 18 Unfortunately, this provision was not enacted, but 19 we'll pursue this policy in appropriate ways. 20 Q. And then the last of the OIG reports that 21 I'd like to ask you about is attached as Exhibit 94. 22 This is the January 2001 --</p>	<p style="text-align: right;">Page 272</p> <p>1 oranges. I have that isolated memory, but I don't 2 really remember the specific report. 3 Q. What do you remember generally about 4 looking at the prices obtained by the VA under the 5 federal supply schedule? 6 A. That it was a totally different system. 7 Q. How so? 8 A. They had purchasing power, and I think the 9 VA actually purchased the drugs and distributed to 10 their facilities, if I remember right. It's just a 11 different, a whole different system. 12 Q. Was there ever any consideration of using 13 the information available from the federal supply 14 schedule to adjust Medicare reimbursement levels? 15 MS. OBEREMBT: Objection. On the grounds 16 of deliberative process, I'll instruct you not to 17 answer. 18 BY MR. COOK: 19 Q. Mr. Niemann, you are aware that the VA and 20 the federal supply schedule existed, correct? 21 A. Yes. 22 Q. How long were you aware of that?</p>
<p style="text-align: right;">Page 271</p> <p>1 MS. OBEREMBT: Hold on. He doesn't have 2 the exhibit. 3 BY MR. COOK: 4 Q. I'm just putting it on the record. Just 5 for the record, this is a January 2001 OIG report 6 entitled "Medicare reimbursement of prescription 7 drugs." And while you take a look at that particular 8 report, tell me whether or not you recall it, I will 9 mark as Exhibit Abbott 313, a document that I'll ask 10 you to take a look at. 11 (Exhibit Abbott 313 was 12 marked for identification.) 13 BY MR. COOK: 14 Q. And do I take from Exhibit Abbott 313 that 15 you attended an exit conference for the OIG report 16 that's marked as Exhibit 94? 17 A. Yes. It looks that way. 18 Q. Do you remember this particular OIG 19 report? 20 A. No. Well, I remember the issue of looking 21 at the Department of Veterans Affairs, because 22 that -- that, as I remember, was like apples to</p>	<p style="text-align: right;">Page 273</p> <p>1 A. I don't remember. Mr. Vito would have 2 told me that and I don't remember when that was. 3 Q. Leaving aside what deliberations went into 4 it, in fact, the Medicare program never used that 5 data to adjust their reimbursement levels, correct? 6 A. Well, it was AWP. 7 Q. At that point it was AWP, based on the 8 statute, correct? 9 A. Oh, right. In 2000, it was. Actually, it 10 was some reduction of AWP, I guess. 11 Q. Was it 95 percent of AWP? 12 A. Did it change again? I don't remember. 13 Q. Whatever it was, it was? 14 A. Whatever it was. 15 Q. Yes, sir. Why don't we take a five-minute 16 break, and I'll line up some exhibits so we can move 17 through efficiently. 18 THE VIDEOGRAPHER: Going off the record. 19 The time is 15:58:52. 20 (Recess.) 21 THE VIDEOGRAPHER: Going back on the 22 record. The time is 16:09:40.</p>

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

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In re: PHARMACEUTICALS INDUSTRY : MDL No. 1456  
AVERAGE WHOLESALE PRICE : Civil Action  
LITIGATION : 01-CV-12257-PBS

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THIS DOCUMENT RELATES TO: : Judge Patti B.  
United States of America, ex : Saris  
rel. Ven-a-Care of the Florida :  
Keys, Inc., :  
vs. : Chief Magistrate  
ABBOTT LABORATORIES, INC., : Judge Marianne  
No. 06-11337-PBS : B. Bowler

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Baltimore, Maryland

Thursday, October 11, 2007

Continued Videotaped Deposition of ROBERT NIEMANN

Volume 2

Henderson Legal Services  
202-220-4158



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<p style="text-align: right;">Page 477</p> <p>1 Q. What did you understand to be the 2 consequences of the issuance of program 3 memorandum AB-00-86? 4 A. If a carrier considered any of these 5 data, as I recall, it would have lowered the 6 Medicare payment allowance for that drug. 7 Q. What was the consequence of withdrawing 8 AB-00-86 on November 17, 2000? 9 A. Well, I remember the agency being very 10 clear that it was a suspension, and that's the 11 term they specifically used, they suspended it. 12 What was the consequence? 13 Q. Yes. 14 A. I guess it basically would have 15 remained in place whatever the payment allowances 16 were. 17 Q. In your description of carrier 18 discretion before, would it be true that even in 19 the absence of Exhibit Abbott 184, which is 20 transmittal AB-00-86, that carriers would have 21 been authorized to consider information such as 22 this in calculating AWP's?</p>	<p style="text-align: right;">Page 479</p> <p>1 for the deliberations that aren't being revealed? 2 MS. OBEREMBT: You asked him the 3 motivation. 4 MR. COOK: Uh-huh. 5 MS. OBEREMBT: Unless it's stated in 6 this document, I don't think he can discuss 7 internal deliberations within the agency that 8 aren't reflected in this document. 9 BY MR. COOK: 10 Q. Are there internal deliberations 11 relating to this document that you would have to 12 reveal in order to answer my question? 13 A. I think so. If it's not stated in 14 here, then anything I know -- yes, yes. 15 Q. Among who -- among whom did those 16 deliberations take place? 17 A. My chain of command and analysts in the 18 Office of Legislation. 19 Q. Anyone else? 20 A. All internal. It would all have been 21 HCFA people. 22 Q. You didn't have any discussions with</p>
<p style="text-align: right;">Page 478</p> <p>1 MS. OBEREMBT: Objection. 2 A. I'm not really -- I'm not really in a 3 position to know that. 4 Q. Do you know why it was that CMS issued 5 Exhibit Abbott 184? 6 A. Usually that's in the program 7 memorandum itself. Is it not in there? Oh, the 8 purpose, thank you, is to provide you with an 9 alternative source of average wholesale price 10 data. 11 Q. As counsel pointed to you, that 12 certainly is the stated purpose of the program 13 memorandum. I'm asking you why, the motivation 14 for issuing the program memorandum. 15 MS. OBEREMBT: I'm going to object to 16 the extent you're trying to get at deliberative 17 process information. If you can answer without 18 referring to something covered by the 19 deliberative process privilege, please do so. 20 THE WITNESS: I don't think I can. 21 MS. OBEREMBT: Okay. 22 MR. COOK: Could I get the foundation</p>	<p style="text-align: right;">Page 480</p> <p>1 anyone at the Department of Justice about whether 2 to issue this program memorandum? 3 A. I don't remember that, but I don't 4 think the agency would have -- I don't remember 5 that. 6 Q. The program memorandum, Exhibit Abbott 7 184, refers to the National Association of 8 Medicaid Fraud Control Units, NAMFCU. 9 A. Right. 10 Q. N-A-M-F-C-U; is that correct? 11 A. Yes. 12 Q. Did you discuss with NAMFCU why this 13 program memorandum was being issued? 14 A. I don't remember ever talking with that 15 -- that they were -- no, I don't remember talking 16 with anyone there. 17 Q. Is there anything else you recall about 18 the deliberations that form the basis for 19 counsel's instruction not to -- not to answer my 20 last question? 21 MS. OBEREMBT: He did just answer your 22 last question.</p>

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<p>1 data; not to some selection process that went 2 into the program memorandum. 3 Q. Well, the question -- the premise of 4 the question, am I correct, is that some brand 5 names and some NDC numbers used by the DMERCs 6 were not included on Attachment 1 to the program 7 memorandum, correct? 8 A. Yeah, that's what I would surmise from 9 that too. 10 Q. And so your answer was that HCFA wasn't 11 the one who chose which to include, but DOJ and 12 NAMFCU were, correct? 13 A. Yeah. I'm being a little picky here. 14 I don't think you meant the way I took it. I 15 don't think the DOJ chose which NDCs to go into 16 the program memorandum. I think they chose which 17 NDCs to report to us. We didn't tell Justice 18 which NDCs we wanted them to report to us. See 19 what I'm saying? So ultimately I think what I 20 meant by this, what I would have meant was that 21 the data in the PM came from DOJ. 22 Q. But your answer says specifically that</p>	<p>1 and you indicated that you would provide guidance 2 and subsequent correspondence concerning future 3 updates. Do you see that? 4 A. I do. 5 Q. What was HCFA's plan for providing 6 future guidance? Was it to get additional data 7 from DOJ and pass it on? 8 A. I don't remember that we had a plan. 9 Q. Did anyone within the agency oppose the 10 issuance of transmittal AB-00-86? 11 MS. OBEREMBT: Objection, calls for 12 deliberative process. 13 MR. COOK: Would that be an instruction 14 not to answer? 15 MS. OBEREMBT: Why don't you ask him if 16 he remembers any discussions with people in the 17 agency, because if he doesn't remember anything, 18 I don't need to instruct him not to answer. 19 MR. COOK: How about I ask him the 20 question I asked him. I can ask another one 21 later. 22 MS. OBEREMBT: All right. Well, let me</p>
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<p>1 HCFA did not choose the products in the program 2 memorandum, correct? 3 A. Yeah, right, it didn't choose the data. 4 Obviously HCFA would have made the choice if we 5 were not going to publish any part of the data 6 that we received in the PM, we would have decided 7 that, but I don't think we did, and based on 8 this, we didn't. 9 Q. Is it your understanding that HCFA 10 published all of the data that the DOJ and NAMFCU 11 provided to it? 12 A. That's what I would take this to mean, 13 right. 14 Q. And in fact, in the next question, when 15 the DMERCs asked how HCFA determined what 16 strength, what form, what quantity and what 17 packaging to use, you again referred to DOJ and 18 NAMFCU as determining those questions, right? 19 A. Right. 20 Q. The last question in -- in this list of 21 questions from the DMERCs asks whether HCFA is 22 going to update this information in the future,</p>	<p>1 go confer with him. 2 MR. COOK: Go off the record. 3 THE VIDEOGRAPHER: This marks the end 4 of Tape 4 Volume 2 in the deposition of Robert 5 Niemann, going off the record. The time is 6 15:46:48. 7 (Recessed at 3:46 p.m.) 8 (Reconvened at 4:00 p.m.) 9 (Exhibit Abbott 356 and Exhibit 10 Abbott 357 were marked for identification.) 11 THE VIDEOGRAPHER: This marks the 12 beginning of Tape 5 Volume 2 in the deposition of 13 Robert Niemann, going back on the record. The 14 time is 16 and 30 seconds. 15 BY MR. COOK: 16 Q. Mr. Niemann, the court reporter has 17 handed you what she has marked Exhibit Abbott 18 356. Although before that, let's get the answer 19 to the question that I had pending. I apologize. 20 Let me ask it one more time, see where we stand. 21 Did anybody at the agency, Mr. Niemann, oppose 22 the issuance of AB-00-86?</p>

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